No. 10412.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN GENERAL INSURANCE COMPANY, a corporation,

Appellant,

vs.

L. L. BOOZE, FRANK L. VINCENT, an individual, FRANK L. VINCENT, doing business under the firm name and style of Vincent's Dairy,

Appellees.

APPELLANT'S OPENING BRIEF.

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Preliminary Statement.

This cause comes up on appeal from an order and judgment thereon dismissing the complaint.

The complaint is for Declaratory Relief, predicated upon the proposition that the California Workmen's Compensation Act provides the exclusive recourse of an employee against his employer. From this premise it is concluded that since there is no longer a common law right of action in the employee against the employer because of

alleged negligence of the latter in driving his motor vehicle, there likewise is, for such an accident, no coverage engendered from a policy of an insurance company indemnifying the employer against responsibility for claimed negligence on his part in driving such motor vehicle.

The purpose of this cause of action was to have the Court declare the rights of the parties under the policy-contract issued by the plaintiff American General Insurance Company, a corporation (hereinafter called "American General") to Frank L. Vincent (hereinafter called "Vincent"). The defendant L. L. Booze (hereinafter called "Booze") was sued as an interested party. The minor son of Booze was killed in the accident described in the complaint, and Booze has brought suit in the State Court for alleged wrongful death, naming in said suit not only his employer Vincent, but also one Ray White, the driver, and we believe owner, of the automobile which came into collision with the Vincent truck. Since deceased was a minor, Booze is the only person to whom would occur the cause of action, if any, for wrongful death.

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ISSUES.

I.

Federal Court Jurisdiction.

The general jurisdiction of the Federal Court depends, in this case, on the diversity of citizenship between the appellant on the one hand and the respondents on the other. There was no issue raised but that these pleadings sufficiently alleged that appellant is a citizen of the State of Texas. [See par. I of the complaint, Tr. of Rec. p. 2.]

In addition, of course, there must be a sufficient allegation that the amount involved a value of $3,000.00. That allegation is contained in paragraph VI of the complaint, at the bottom of page 5 and at the top of page 6 of the Transcript of Record.

Therefore, as was said in *Ohio Casualty Ins. Co. v. Plummer,* 13 Fed. Supp. 169:

> "There is a diversity of citizenship, and the controversy involves more than $3000, exclusive of interest and costs, and the court has jurisdiction. (Jud-Code Sec. 24(1) section 41, title 28, U. S. C. A.; *United States v. West Virginia,* 295 U. S. 463, etc.)"

See also a companion case, *Commercial Casualty Ins. Co. v. Humphrey,* 13 Fed. Supp. 174, where, at page 178, the court said:

> "Plaintiff's suit is to declare the rights and other legal relations of the parties to the suit under the policy. Under the policy plaintiff may be liable for as much as $10,000 for . . . one person, $20,000 for . . . the same accident, etc. . . . The test of jurisdiction is not what Pierce may claim against plaintiff, but the maximum amount for which

plaintiff may be liable under the policy. The case comes within the principle announced by the Supreme Court in Packard v. Bahton, 264 U. S. 140, 142, etc. . . . I entertain no doubt that the amount in controversy here involves more than $3000, exclusive of interest and costs, and that the court has jurisdiction."

B. Special Jurisdiction Under the Declaratory Relief Act.

Having established the general jurisdiction of the Federal Court, a condition precedent to any consideration of the complaint, the next problem is to bring the case under the provisions of the Federal Declaratory Relief Act, 28 U. S. C. A., Section 400. Of this Act, paragraph (3), referring to trial jury, is not here material. The first two paragraphs of the Act are:

"(1) In cases of actual controversy the courts of the United States shall have power, upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith."

1-B. *All of the Necessary Elements by Way of Interested Parties and Actual Justiciable Controversy Are Present.*

Since the motion to dismiss, like its predecessor the demurrer, admits the truth of the allegations of the petition, yet challenge their sufficiency, despite such truth, our first duty is to analyze the Act to see what are the elements necessary to the establishment, or proper statement, of the cause of action. That analysis, it appears plainly, leaves only one real issue here to be weighed, namely, Is there an actual controversy?

(1) All of the "interested" parties are before the Court. These parties must be determined by inquiring, who, if anyone, would have the right or obligation under the indemnity contract if, after trial of the tort case on its merits, a judgment were entered in favor of Booze and against both White and Vincent?

In California, a tort-feasor is not entitled to contribution from his joint tort-feasors, if any. In the case of *Smith v. Fall River, etc. Dist.*, 1 Cal. (2d) 331, the insurance company had indemnified two of three defendants. A judgment in favor of the injured plaintiff was entered against all three defendants. On appeal, which affirmed the judgment, the same company wrote the surety bond for the same two defendants. The third defendant put up no stay bond. The company attempted to pay the judgment in its capacity as a surety, and then assert subrogation rights against the third defendant (who was apparently uninsured and who put up no stay bond). At page 334, the Court said:

> "As appellant cannot recover from either the district or Fitzwater by reason of its indemnity bond.

can it recover against the respondent whose negligence concurred with that of Fitzwater in causing plaintiff's injuries? It is well settled in this state that there is no right of contribution between joint tort-feasors whose concurrent negligence has made them jointly liable in damages. (*Adams v. White Bus Line,* 184 Cal. 710 (195 Pac. 389).) Therefore, had either of the two defendants, the school district or Fitzwater, paid said judgment, no claim for contribution against the respondent could have been made by the defendant making said payment. Neither could the appellant, after paying the judgment as the indemnitor of the two defendants, the school district and Fitzwater, compel contribution or recover anything from the respondent, a joint tort-feasor with the other two defendants. This was the point involved and definitely settled in the case of *Adams v. White Bus Line, supra.*"

Likewise, in *Jennings v. Day,* 7 Cal. App. (2d) 555, at page 557, the court remarked:

"The first point made by the appellant is that the evidence is insufficient to justify the finding that the defendant Davidson was not negligent. Appellant admits that if the court found that Davidson was guilty of negligence this would not excuse Day. He contends, however, that the trial court obviously ignored the evidence and found Day solely liable for the accident and that appellant was, therefore, not afforded a fair and impartial trial. Appellant cannot complain of the action of the trial court in finding that Davidson was not negligent. There is no right of contribution between two joint tort-feasors, and respondent is the only party aggrieved by the finding of the trial court. (*Forsythe v. Los Angeles Ry. Co.,* 149 Cal. 569 (87 Pac. 24).)"

Therefore, the defendant White from our state court case is eliminated in this action—as not being an "interested" party. He is not "interested," in the sense used in the Act, because no right accrues to him, nor has he any obligation related to the contract, no matter how the personal injury case in the state court might be decided. That he might have a very real practical interest in the payment of any judgment does not change his legal status as a joint tort-feasor.

(2) If there were a *valid* judgment in favor of Booze and against Vincent, then Vincent, under the terms of the contract, would be entitled to have payment of said judgment by his insurance carrier—up to the expressed limits of the policy. He therefore has a vital interest in this controversy.

(3) Booze, should he become the holder of a *valid* judgment against Vincent, either alone or jointly against White—would be entitled to have the judgment satisfied up to the limits expressed in the policy-contract. The indemnification in the present contract is one against loss, rather than one against liability.

The leading case in point seems to be the old one of *Moore v. L. A. Iron & Steel Co.*, 89 Fed. 73, decided by Judge Wellborn in 1898. In it he quotes from section 2777 of the California Civil Code as follows:

> "One who indemnifies another against an act to be done by the latter, is liable jointly with the person indemnified, and separately, to every person injured by such act."

The Court there held that, since the contract indemnified against *liability*, the cause of action arose against the insurance company immediately upon the happening of

the accident. It has remained the unimpeached authority that the injured party does have a right against the indemnitor. Where, as here, that indemnity does not ripen until loss, the injured party must first get judgment before bringing suit. That such "coercive" action is not necessary under Declaratory Relief.

Therefore, Booze, as a claimed prospective holder of a judgment against Vincent, becomes a prospective holder of rights against American General's policy and, as such, is established as an "interested" party in the legal sense in which the phrase is used in the Act.

(4) It is apparent that, as between both Booze and Vincent on the one hand, and American General on the other, the possible rights—those being claimed by Booze and Vincent—create possible obligations against American General because of the indemnity contract. That is, should there be a valid judgment for Booze, American General—if there were no contest concerning the policy coverage, etc.—would owe both Vincent and Booze the duty to pay up to its policy limits.

As between Vincent and American General there is still another question of rights and obligations, in which Booze is only secondarily interested, and that not from a money point of view. That question is whether or not there is any duty on the part of American General to furnish a defense to Vincent in the trial in the state court. If there is no right of recovery in Booze against Vincent as the employer of the deceased minor, then likewise there is no duty to defend.

Thus it is seen that all of the appearing parties are proper as being "interested" and, as a corollary, all of the necessary parties are named.

2-B. *There Is No Obligation on the Part of Appellant to Any Defendant.*

(a) There Is No Obligation Under Exclusion Clause (e) of the Policy!

A photostatic copy of the policy-contract, as issued by American General to Vincent, is attached to the complaint, marked Exhibit "A," and, by reference, is incorporated in the complaint as though fully set forth. See paragraph IV of Complaint, bottom of page 3 and top of page 4 of Transcript of Record. Exclusion clause (e) provides as follows:

> "Under Coverage A, for such bodily injury to or death of any employ of the Insured while engaged in the business of the Insured, other than domestic employment, or in the operation, maintenance or repair of the automobile, or to any obligation for which the Insured may be held liable under any Workmen's Compensation Law."

NOTE: Coverage "A" is "Bodily Injury Liability."

(b) There Is No Obligation Under the Law of California!

The exclusion clause is expressed in agreement with the requirements of the California Workmen's Compensation Law.

The codified insurance laws of the State of California are contained between sections 11650 and 11662 of the Insurance Code, enacted in 1935. It probably is not contended by any of the parties but that our policy *could not be construed* as covering a loss under the Workmen's Compensation Law. It is an ordinary automobile policy, and must be construed as such.

It is not open to doubt that exclusive jurisdiction lies with the Industrial Accident Commission to try and determine controversies of this type between the employer and employee under the laws regulating Workmen's Compensation!

The case of *Buttner v. American Bell Tel. Co.,* 41 Cal. App. (2d) 581 (November 22, 1940), is a comprehensive discussion of the established rule of law. In that case the court said, at page 583, *et seq.*:

> "Appellant raises but one question here, namely, whether the provisions of article XX, section 21, of the California Constitution, creating the Industrial Accident Commission, 'bar an individual who has formerly been in the employ of the defendant, from bringing any action in the Superior Court, regardless of the nature of the action.' The question thus attempted to be raised, properly stated, is whether, in view of the said constitutional provisions and those of the Workmen's Compensation Act (now embodied in the Labor Code), the Superior Court has jurisdiction over a cause of action such as that alleged in appellant's first count in his complaint herein. As seen above, this is one of the questions raised by respondents' demurrer.
>
> "There can be no question that said cause of action is one for damages for personal injuries. It also affirmatively appears that the injuries sustained arose out of and in the course of appellant's employment by respondents. The distinction attempted to be drawn by appellant between this case and the ordinary workmen's compensation case is that here appellant bases his cause of action upon the alleged deceit of respondents in misrepresenting the nature of a substance used by appellant while in respondents' employ. In

other words, the proximate cause of appellant's injuries is stated to be a willful act of his employer.

"It appears that appellant's injuries were sustained prior to the enactment of the pertinent provisions of the Labor Code and at a time when the Workmen's Compensation Act was in force. Section 21 of article XX of the California Constitution gives to the legislature plenary power to create and enforce a complete system of workmen's compensation, by appropriate legislation. To that end the legislature enacted the provisions of the Workmen's Compensation Act, now contained in the Labor Code. (Stats. 1917, p. 831, as amended; Act 4749 Deering's General Laws, 1937; now contained in Division IV of the Labor Code.) Under those provisions the Industrial Accident Commission of the state is given exclusive jurisdiction over matters of compensation for any injury arising out of employment, such as that of appellant here. It is not claimed that appellant's employment was of a type excluded by such provisions, and while it appears that respondents are all part of the "Bell System" of telephone service, it does not appear, nor is it claimed that appellant was engaged in work in interstate commerce, but on the contrary, it affirmatively appears from the complaint that appellant was employed at work in the county of Los Angeles, State of California. The exclusive jurisdiction of the Industrial Accident Commission over such claims as that presented by appellant's first cause of action is well settled, and a demurrer on the ground, among others, that the court had no jurisdiction of the subject matter of the action was properly sustained. (*Burton v. Union Oil Co.*, 129 Cal. App. 438 (19 Pac. (2d) 9). See, also, *Alaska Packers Assn. v. Industrial Accident Com.*, 200 Cal. 579, 583 (253

Pac. 926), citing *De Carli v. Associated Oil Co.*, 57 Cal. App. 310 (207 Pac. 282); *Fitzpatrick v. Fidelity & Casualty Co.*, 7 Cal. (2d) 230, 233 (60 Pac. (2d) 276); *Tipton v. Atchison, T. & S. F. R. Co.*, 298 U. S. 141, 154 (56 Sup. Ct. 715, 80 L. Ed. 1091, 104 A. L. R. 831).)

"The fact that appellant founds his cause of action upon the deceit allegedly practiced by respondents is immaterial. It cannot be disputed that the jurisdiction of the Industrial Accident Commission prevails regardless of the cause of accident or injury. Compensation for injuries caused by the serious and willful misconduct of the employer is expressly provided for in section 6 of Workmen's Compensation Act, now section 4553 of the Labor Code. It is clear that section 21 of article XX of the Constitution and the legislation enacted pursuant thereto are intended to include all injuries incurred in the course of employment, irrespective of the manner in which they might occur. (*Sarber v. Aetna Life Ins. Co.*, 23 Fed. (2d) 434.)

"It should be noted that the Sarber case, *supra,* concerned an action in damages for deceit on the part of the employer's insurance company in concealing from plaintiff the fact that a fragment of steel had not been removed from his leg following an accident in the course of his employment. A demurrer was interposed on the ground of the lack of jurisdiction of the court over the subject matter, which demurrer was sustained. Plaintiff was an employee within the contemplation and under the provisions of the California Workmen's Compensation Act, and the Federal Circuit Court of Appeals for the Ninth Circuit upheld the ruling on the demurrer on the ground of the exclusive jurisdiction of the In-

> dustrial Accident Commission over such matters, even where disability has been aggravated by the intervening negligence of carelessness of the employer's physician. It follows that if negligence or carelessness which aggravates the injury does not affect the jurisdiction of the commission, then the willful misconduct or other act which caused the injury is likewise unimportant in that respect. The Sarber case is directly in point here, and should be controlling if further authority were needed."

We will not attempt to further amplify the discussion except to note the rule's approbation by the Federal Court in the *Sarber* case. On this point we also commend to the Court the case of *Surgeon v. Alaska Packers Assn.,* 26 Fed. Supp. 241, and the case therein cited of *Alaska Packers Assn. v. Marshall,* 95 Fed. (2d) 279, both in the Ninth Circuit, sustain this jurisdiction even to the exclusion of Federal courts.

The complaint reveals that, as a part of the controversy, the parties take opposite sides on the question of whether or not the deceased (who was learning a dairy route so that he could substitute while the regular boy took a week's vacation), was an employee.

As was said in *Beatty v. San Diego Electric Ry. Co.,* 5 Cal. Ind. Acc. Dec. 241 (approved by the California Appellate Court in *Union Lumber Co. v. Ind. Acc. Comm.,* 12 Cal. App. (2d) 588 at 596):

> "Applicant sustained an injury in the course of his employment while acting as 'student' motorman on the defendant's street railway *without pay*, it being the expectation that by two days later he would have learned the routes and would be put on the payroll as a regular motorman. The Commission *held* that there existed a contract of hire . . ."

II.

The Applicability of Declaratory Relief as Applied to This Particular Case.

A. The Issues of Whether or Not There Is Coverage Involves, of Necessity, the Question of Whether or Not There Is an Original Duty to Make Large Expenditures for Defense.

It is apparent from the foregoing statements that there is an "actual controversy" between the "interested" parties, all of whom are before the Court.

The justiciability of the controversy is shown by the allegations of paragraph IX of the complaint [pages 8 and 9 of Transcript of Record]. Noteworthy is the fact that the controversy is not limited alone to responsibility for payment of any judgment which might be entered in the state court. *It involved also the question of whether or not American General must expend a considerable amount of money to defend the state court action.* Therefore, all of the controversies could not possibly be decided in the California court, even if this appellant were a party to that case. Appellant is not a party to the personal injury case, and could not properly be forced to appear therein. To say that appellant may defend in the tort action, and perhaps thereby determine most of the issues, does not do justice, because it would require defendant to waive its right not to defend if there is no coverage—*a waiver which could, of itself, demand the expenditure of considerable sums of money.*

The necessity to set up large contingent reserves against possible and uncertain loss, and the expense incident thereto, even in the event of an ultimate successful defense, are penalties which appellant should not be re-

quired to stand if, in fact and in law, there was no coverage under the policy.

It is apparent from the alleged facts, which are required to be admitted for the purposes of this appeal to be true, that appellant has presented justifiable issues which would entitle American General to the relief as prayed for.

1-A. *A Discussion of the Applicability Law—Excerpts From Borchard:*

By way of aid to our position, we suggest the review of a few statments by the author of the laws governing Declartory Relief in this country. At page 634 *et seq.* of the second edition of Declartory Judgments by Borchard, the author says:

> "Insurance contracts, by virtue of their aleatory character and the many parties that may become involved, have proved to be peculiarly susceptible to declaratory adjudication, whether before or after the risk has matured. This has been especially true of casualty insurance policies, which insure under certain conditions against injuries to third parties whose claims against the insured, his employees and the company have presented some of the most interesting cases of recent years. . . .
>
> "In addition, certain economic and social facts have played a part in encouraging resort to declaratory rather than coercive relief. On the part of the insured or beneficiary, a declaration of liability against a company, since most insurance companies are responsible, is as effective as a money judgment or coercive relief, and it is cheaper, speedier and more efficient. Numerous actions have been brought

simply to declare in force a policy from which a company sought to escape by reason of alleged breach by the insured. On the part of the insurance company other conditions operate. When a casualty company is a defendant or co-defendant with the insured, juries are apt to be swayed by sympathy and be partial to the plaintiff; hence insurers have found great advantage in segregating the factual issue of coverage or breach by the insured and obtaining a declartory judgment in an independent action to the effect that there was 'no coverage' under the policy or that the company's defense was sound and exonerated it from further participation in the case. Not only is the company relieved by a judgment in its favor from defending a negligence action against the insured, but the determination of the fundamental economic fact that there is 'no coverage' enlightens and guides the injured person and the insured. Indeed, such a determination has basic importance for all parties concerned in the negligence action, whether an injunction against its continuance is issued or not, for a suit against an impecunious insured unsupported by a responsible insurer may not be pursued, or else the passive indifference of the insured may well be converted into self-reliant defense.

"The passage of the Federal Declartory Judgments Act in 1934 has opened up a vast area of declaratory relief which has been especially availed of by insurance companies seeking to escape the obligation of defending a negligence suit brought against the insured or of paying a judgment that might be found against him, on the ground that the policy did not cover the risk and that the company should be relieved of all liability in the case. The clearing up of this fundamental question of coverage and of com-

pany liability has proved an advantage in many cases and has on the whole been looked upon with favor by the courts. The declaratory action for immunity has often been filed in the federal court when diversity of citizenship existed, whereas the action or actions for negligence have been brought in the state courts. . . ."

And at page 645:

"Possibly the greatest interest in the development of declaratory procedure has been aroused by the privilege which it affords to the party charged or the debtor or obligor to disavow liability or claim exemption, exoneration or release from a burden to which ostensibly he is exposed. As already observed, equity long has recognized a legal interest in the removal of clouds from title to real estate, but it had until recently failed to perceive that any unjustified claim created a legal interest in the party charged to have the claim declared invalid. Instead of awaiting the pleasure of the accuser or claimant in bringing his demand or claim to adjudication, legislators and courts have found that social peace is promoted by taking under judicial cognizance the desire of the party charged or in jeopardy to be relieved of the peril, the insecurity and the uncertainty created by an unjust claim, actual or potential. The procedure for declaratory adjudication has thus served as a stabilizer of legal relations."

And at page 646:

"The insurance cases which have attracted most attention to the declaratory judgment are those in which a casualty company institutes an action against the insured, joining or not joining the injured parties,

for a declaration that the company is *not* under a duty to defend or to pay any eventual judgment, because the injury or death is not within the coverage of the policy or because the company has some defense which exempts it. The courts, especially those of New Hampshire and the federal courts, having at once conceded that the issue presented a 'case' or 'controversy,' made the propriety of issuing the declaration turn on questions of policy and discretion in trying the issue of non-liability or limited liability *before* the suit of the injured person for negligence had been litigated to judgment, and raised the question whether that suit should be stayed or the company be relegated to its defense in that suit."

And at page 647:

"*For one or more of these reasons, insurance companies have had occasion to avail themselves of this opportunity to obtain relief from unjust claims by suing the insured or his beneficiary for a declaration of non-liability, for lack of coverage or because the insured's breach of warranty or condition of risk or covenant excuses them from liability or from defending the insured against third party claims or paying any judgment thus obtained. . . .*" (Italics added.)

And at page 652:

"It is therefore of exceptional importance to both insurer and insured, if not indeed to the injured person, to know at the earliest possible moment whether the policy covers the loss or not. The liability under the policy and the liability for negligence are indeed two separate transactions. While in general the parties in interest are the same, the company is not usually, except for statute, a party to the negligence

action. It may be important, therefore, to try the question of immunity separately. This is especially so where an impecunious or complaisant insured is involved who will readily admit liability and accept judgment against him *pro confesso,* both he and the injured person realizing that the real parties in interest are none other than the company and the injured person. If the company were exempt, there might be no lawsuit for alleged negligence. Moreover, the insured or injured person may delay his suit, as in the *Haworth* case, and it might work an injustice entailing loss of evidence, the setting up of reserves and other inconvenience and suspense to have to await the pleasure of the insured or injured person to commence the action. In some states, indeed, the company's defense of the suit for negligence is a bar against any later disclaimer of liability in the subsequent action for indemnity."

2-A. *A Discussion of the Case Law as Related to the Only Two Issues Raised by the Motion to Strike.*

The motions of Booze and Vincent to dismiss, although prepared by separate counsel—opponents in the state court —are in identical words. Other than the general claim that no cause is stated, they present alleged grounds which long since, and often, have been determined in favor of appellant.

The case of *Maryland Casualty Co. v. Hubbard,* 22 Fed. Supp. 697, is a clear statement on the first point. There co-insurers were parties, and a motion to dismiss was made upon the ground that no cause of action was stated. Discussing like problems Judge Yankwich said:

"Its position is that there is no privity between it and the plaintiff. It says that only after Hubbard

secures a judgment against Ridgeway Audit, Inc., and the plaintiff pays it, would it be subrogated to whatever right of action Ridgeway Audit, Inc., had against defendant company by reason of the Petronovich policy. This right, it declares, is purely contingent and dependent upon the happening of future events which have not yet occurred or upon an issue which has not yet ripened and which is outside of the power of the court to determine through a declaratory judgment.

"To be entertained under the Declaratory Judgments Act, controversies must be justiciable.

"In *Aetna Life Insurance Co. v. Haworth,* 1937, 300 U. S. 227, 240, 241, 57 S. Ct. 461, 464, 81 L. Ed. 617, 108 A. L. R. 1000, the court has stated the conditions which make for justiciability: *'The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.* * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising that the law would be upon a hypothetical state of fact. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.' (Italics added.)

"In interpreting declaratory judgments acts, the trend is to extend their benefit to the interests of parties which are jeoparded or challenged even before a right of action exists or cause of action accrues. Borchard says: 'The opposition to the plain-

tiff's demand must come from a source competent legally to jeopardize his rights. Where, however, that is conceded, it still remains to determine whether the plaintiff has a sufficient interest, pecuniary or personal, to institute a proceeding worthy of judicial relief. He must show that his rights are in direct issue or jeopardy; and incidental thereto, must show that the facts are sufficiently complete, mature, proximate, and ripe to place him in gear with his adversary, and thus to warrant the grant of judicial relief. Just when the controversy has reached the stage of maturity cannot be *a priori* defined.' *Borchard, Declaratory Judgment* (1934), p. 36.

"A declaration of nonliability is within the ambit of justiciability. *Edwin Borchard, Justiciability* (1936), 4 University of Chicago Law Review, 1-24; *Borchard, Recent Developments in Declaratory Relief* (1936), 10 Temple Law Quarterly, 233.

"In the field of liability insurance, the right to a judicial declaration of liability or nonliability upon the happening of the accident has been given full recognition. *Aetna Life Insurance Co. v. Haworth,* 1937, 300 U. S. 227, 57 S. Ct. 461, 81 L. E. 617, 108 A. L. R. 1000: . . . And see *John A. Appleman, 'Automobile Insurance and the Declaratory Judgment,'* 1937, 23 A. B. A. Journal, 551.

"A demand that the insurer defend an action warrants an appeal to courts for a declaration of nonliability. *Associated Indemnity Corporation v. Manning,* 1937, 9 Cir., 92 F. 2d 168; . . . When the policy obligates the insurer to defend, declarations seeking to free him from the obligation have been entertained even when *no demand* to defend a pending action had actually been made on him. *Ohio Casu-*

alty Ins. Co. v. Plummer, 1935, D. C. Tex., 13 F. Supp. 169; . . .

"These decisions accord with others holding that courts may intervene by way of declaration 'either before or after the stage of relief by coercion has been reached.' *Gully v. Interstate Natural Gas Co.,* 1936, 5 Cir., 82 F. 2d 145, 149; . . .

"To apply these principles to the facts here:

"An action for damages resulting from the injury is pending. The bill, the allegations of which are taken as true, for the purpose of the motion to dismiss, *Hill v. Wallace,* 1922, 259 U. S. 44, 61, 42 S. Ct. 453, 455, 66 L. Ed. 822; *Arizona v. California,* 1931, 283 U. S. 423, 452, 51 S. Ct. 522, 525, 75 L. Ed. 1154; *San Francisco S. News Co. v. City of South Francisco,* 1934, 9 Cir., 69 F. 2d 879, avers that both policies cover the risk. The insured under the plaintiff's policy, Ridgeway Audit, Inc., is a party to this action. But while the insured under the defendant-insurer's policy (Petronovich) is not a party, because he is beyond our jurisdiction, the bill avers that the policy inured also to the benefit of the defendant Blackwell, who was driving with the owner's consent. If judgment in the action for damages, to which it is also a party, be against Ridgeway Audit, Inc., it would be entitled to reimbursement from Blackwell and from the defendant-insurer.

"The plaintiff, if compelled to pay the judgment, by reason of its coverage, would be subrogated to the rights of Ridgeway Audit, Inc., against the defendant. *Central Surety & Ins. Corporation v. London & Lancastershire Indemnity Co.,* 1935, 181 Wash. 353, 43 P. 2d 12; . . .

"Often has a declaration been allowed, although liability depended upon a contingency which had not yet happened. . . .

"Neither insurer could be joined in that action. *Van Derhoof v. Chambon,* 1932, 121 Cal. App. 118, 8 P. 2d 925. So their respective obligations cannot be determined there. Therefore, one of them comes here and seeks a declaration of the conditions of its liability which, if made, will amount to a declaration of no obligation to defend and of conditional liability for judgment, *i. e.,* liability only after the full liability of the defendant-insurer has been discharged under its policy.

"Assume that no compulsory judgment of any kind could be rendered against the defendant-insurer, this does not stand in the way of a declaration. . . .

"So here, while the defendant-insurer may not be liable, at present, to the plaintiff, it is as much interested in the determination of that liability as the plaintiff. And, as the determination of its liability might affect adversely that of the plaintiff, the controversy is ripe for determination. *Borchard, Declaratory Judgments* (1934), pp. 35, 40, 42."

In an action for declaratory judgment in *Merchants Mut. Cas. Co. v. Drown,* 199 Atl. 568 (89 N. H. 363), the Court, at page 569, said:

"The sole question of law involved is whether Drown's injuries were compensable under the Workmen's Compensation Act. If they were, the plaintiff's policy does not cover, *and the plaintiff is under no duty to defend Drown's action against Olson* (an additional assured under the automobile policy). If (they) were not, there is coverage." (Italics and parenthetical explanation added.)

We quote from the last case not only because it is one where a declaratory judgment was awarded, but one where the issue on which the action was predicated was the same.

On the general point that these casualty policy problems may properly be clarified by declaratory judgment see also *Aetna Cas. & Surety Co. v. Howell,* 108 Fed. (2d) 148.

We mentioned above the fact that American General is not alone contending that there is no obligation to pay a judgment; that one of the very purposes of this action for declaratory judgment is to determine whether or not there is a duty to *defend.* An interesting discussion of this point appears at page 517 of 139 S. E. (*Ocean Accid. & G. Corp. v. Washington Brick & T. C. Co.,* 148 Va. 829, 139 S. E. 513). The Court said:

> "It is contended, however, by counsel for the brick company, that the insurer was bound by the terms of its policy to defend all suits and actions, or other proceedings, instituted against the employer; basing the argument in this respect upon the third clause of the policy above transcribed. We cannot agree with the argument in this respect. It is true that the provisions of the policy alluded to may have the effect of binding the insurer to defend all suits, although 'such suits, or other proceedings, allegations, or demands are wholly groundless, false, or fraudulent,' as stated in the policy. *It is scarcely logical to hold that this provision concerning the right and obligation to defend the suit, which is often contained in the indemnity policies, would be intended to bind the insurer to take charge of and defend a suit in which, under the terms of the policy, it had no interest. If this is true, it would result in compelling the insurer to waive its claim of nonliability,* because it is quite generally held that, if the insurer does

> defend and a judgment results against the employer, the insurer is bound to pay the judgment. *The language* of the policy which requires the insurer to defend suits which may at any time be instituted against the employer 'on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor,' *must be read in connection with the fundamental contractual obligation appearing upon the face of the contract between the parties, which was that the insurer would indemnify the employer only in case of recovery of damages by employees legally employed.*" (Italics added.)

From these cases clearly it must be concluded that the mere pendency of the tort action in the state court cannot be a bar to this action. Neither the parties nor the issues coincide! First, American General is not a party to that action, and may not properly be made such. Second, not all of the issues here presented can be tried in the state court action. This must be conceded, even though all but one of them might be concluded by indirection. To be *concluded* by the result of the trial of an issue in the state court—as might be true of the issue of employment—is not the same as having that issue *tried!* Further, we contend that Vincent, in turn, contends that the deceased was *not* an employee. So, that issue may never be tried in the state court action for there would seem to be an agreement between Booze and Vincent on this issue. Third, there is one extremely important issue that could never be tried if American General were required to defend Vincent in the state court before having the question of coverage decided. That is the question of whether or not there is any *duty* to defend.

III.

Conclusion.

We think it fitting to conclude with a quotation from *Maryland Casualty Co. v. Pac. Coal & Oil Co.*, 312 U. S. 270. In that case there was a pending action in the state court, yet the Supreme Court held that other necessary elements of federal jurisdiction (diversity of citizenship and a controversy of more than $3000) having been established, the action for declaratory relief was proper. The facts are so near those in our own case as to leave no doubt of our right to have our causes tried. In that case the court said:

> "Petitioner issued a conventional liability policy to the insured, the Pacific Coal & Oil Co., in which it agreed to indemnify the insured for any sums the latter might be required to pay to third parties for injuries to person and property caused by automobiles hired by the insured. Petitioner also agreed that it would defend any action covered by the policy which was brought against the insured to recover damages for such injuries.
>
> "While the policy was in force, a collision occurred between an automobile driven by respondent Orteca and a truck driven by an employee of the insured. Orteca brought an action in an Ohio state court against the insured to recover damages resulting from injuries sustained in this collision. Apparently this action has not proceeded to judgment.
>
> "Petitioner then brought this action against the insured and Orteca. Its complaint set forth the facts detailed above and further alleged that at the time of the collision the employee of the insured was driving a truck sold to him by the insured on a conditional sales contract.

"Petitioner claimed that this truck was not one 'hired by the insured' and hence that it was not liable to defend the action by Orteca against the insured or to indemnify the latter if Orteca prevailed. It sought a declaratory judgment to this effect against the insured and Orteca, and a temporary injunction restraining the proceedings in the state court pending final judgment in this suit.

"Orteca demurred to the complaint on the ground that it did not state a cause of action against him. The District Court sustained his demurrer and the Circuit Court of Appeals affirmed. 111 F. 2d 214. We granted certiorari, 311 U. S. 625, to resolve the conflict with the decisions of other Circuit Courts of Appeals cited in the note.

"The question is whether petitioner's allegations are sufficient to entitle it to the declaratory relief prayed in its complaint. This raises the question whether there is an 'actual controversy' within the meaning of the Declaratory Judgment Act (Judicial Code sec. 274d, 28 U. S. C. sec. 400), since the District Court is without power to grant declaratory relief unless such a controversy exists. *Nashville, C. & St. L. Ry. Co. v. Wallace,* 288 U. S. 249, 259; U. S. C. A. Constitution, Art. III, sec. 2.

"The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to war-

rant the issuance of a declaratory judgment. See *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 239-242. It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case. *Nashville, C. & St. L. R. Co. v. Wallace, supra,* p. 261.

"That the complaint in the instant case presents such a controversy is plain. Orteca is now seeking a judgment against the insured in an action which the latter claims is covered by the policy, and secs. 9510-3 and 9510-4 of the Ohio Code (Page's Ohio General Code, Vol. 6, secs. 9510-3, 9510-4) give Orteca a statutory right to proceed against petitioner by supplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition. Compare *Maryland Casualty Co. v. United Corporation,* 111 F. 2d 443, 446; *Central Surety & Insurance Corp. v. Norris,* 103 F. 2d 116, 117; *U. S. Fidelity & Guaranty Co. v. Pierson,* 97 F. 2d 560, 562. Moreover, Orteca may perform the conditions of the policy issued to the insured requiring notice of the accident, notice of suit, etc., in order to prevent lapse of the policy through failure of the insured to perform such conditions. *Hartford Accident & Indemnity Co. v. Randall,* 125 Ohio St. 581, 183 N. E. 433; see also, *Lind v. State Automobile Mutual Insurance Assn.,* 128 Ohio St. 1, 190 N. E. 138; *State Automobile Mutual Insurance Assn. v. Friedman,* 122 Ohio St. 334, 171 N. E. 591.

"It is clear that there is an actual controversy between petitioner and the insured. Compare *Aetna Life Ins. Co. v. Haworth, supra.* If we held contrariwise as to Orteca because, as to him, the controversy

were yet too remote, it is possible that opposite interpretations of the policy might be announced by the federal and state courts. For the federal court, in a judgment not binding on Orteca, might determine that petitioner was not obligated under the policy, while the state court, in a supplemental proceeding by Orteca against petitioner, might conclude otherwise. Compare *Central Surety & Insurance Corp. v. Norris, supra,* p. 117; *Aetna Casualty & Surety Co. v. Yeatts,* 99 F. 2d 665, 670.

"Thus we hold that there is an actual controversy between petitioner and Orteca, and hence, that petitioner's complaint states a cause of action against the latter."

We do, therefore, respectfully represent that the order dismissing the complaint must be reversed. We pray that the Court consider the other matters presented so that, should the facts establish that the deceased was an employee of Vincent, then Booze must confine his right of recovery to that provided by the Workmen's Compensation Act.

Respectfully submitted,

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